INDEX

Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2, 3, 4, 5

Argument 5, 6, 7, 8, 9, 10

Conclusion 10, 11

TABLE OF CASES

Johnson v. New Jersey, 384 U.S. 719 (1966) 6

Ivan v. City of New York, 407 U.S. 203 (1972) 5

Mullaney v. Wilbur, 421 U.S. 684 (1975) 2, 4, 5, 6

State v. Hankerson, 288 N.C. 632, 220 S.E. 2d 575 (1975) 4, 6

Stovall v. Denno, 388 U.S. 293 (1967) 6

In re Winship, 397 U.S. 358 5

In The

Supreme Court of the United States

October Term, 1976

JERRY DALE HUNTER,

Petitioner,

v

STATE OF NORTH CAROLINA

Respondent.

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

BRIEF OF RESPONDENT
STATE OF NORTH CAROLINA

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals was filed February 4, 1976, and is reported at 28 N.C. App. 456, 221 S.E. 2d 837. Petitioner appealed the decision of the North Carolina Court of Appeals to the North Carolina Supreme Court, and simultaneously petitioned that Court for discretionary review of the decision of the Court of Appeals. Petitioner's appeal was dismissed and discretionary review denied in an Order issued on March 2, 1976. That order is reported at 289 N.C. 453. Copies of pertinent proceedings below are appended to Petitioner's Petition for a Writ of Certiorari to the North Carolina Court of Appeals, Appendices A (Opinion of the Court of Appeals) and B (Order of Supreme Court).

JURISDICTION

Petitioner attempts to invoke jurisdiction of this Court under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

WHETHER *MULLANEY V. WILBUR*, 421 U.S. 684 (1975) SHOULD APPLY TO A CASE TRIED PRIOR TO, BUT PENDING ON DIRECT APPEAL AT THE TIME OF, DECISION.

PROVISIONS INVOLVED

Amendment XIV, Constitution of the United States, reads in pertinent part, as follows:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

Petitioner was indicted for first degree murder by the grand jury of Madison County, North Carolina, in the death of Jonah Massey on January 1, 1974. He was tried for second degree murder. The incident arose on December 22, 1973, at a restaurant near Marshall, North Carolina. There had been an altercation between petitioner on the one hand and Jonah Massey and his son, Cordell Massey, on the other.

The State's evidence at trial tended to show that petitioner had initiated an affray, resulting in Jonah Massey's death. Petitioner's evidence was that the Masseys had attacked him and that he had acted in self-defense. The North Carolina Court of Appeals characterized the evidence at trial as follows:

> "At the trial the State's evidence tended to show: On 22 December 1973 Jonah Massey was eighty-five years old, was in good health and was active. His son, Cordell, drove him to a restaurant at about 7:00 p.m. on that day. As Cordell was parking his car, the defendant

> arrived and struck Cordell and attacked both Cordell and Massey when they got out of the car. The defendant knocked Massey to the pavement with a section of pipe, and Cordell stabbed defendant in self-defense. Massey was treated in the hospital emergency room and released that night. Massey was thereafter bedridden and incoherent until 26 December 1973 when he was admitted to a hospital. Massey died on 1 January 1974. The immediate cause of death was a combination of pneumonia, meningitis, and pericarditis. The blows received on 22 December could have initiated the chain of events which produced death.
>
> "Defendant presented evidence that both Cordell and Massey attacked him without provocation as he walked by their car in the restaurant parking lot; that both of the Masseys had knives and cut him; that he struck back and tried to get away from them and that he used the pipe in self-defense." 28 N.C. App. at 466.

The trial court instructed the jury that if the defendant acted properly in self-defense, he would not be guilty. It further instructed the jury that:

> "If you find from the evidence in the case that the defendant Hunter unlawfully killed Jonah Massey, not with malice, but in defending himself, and that he used excessive force — that is, more force than was reasonably necessary under the circumstances, or more force than reasonably appeared necessary to the defendant at the time and place under the circumstances — to protect himself from death or great bodily harm, then it would be your duty to return a verdict of guilty of manslaughter. Manslaughter, or voluntary manslaughter, is the unlawful killing of a human being without malice." R. 84.

The jury was told: "[I]n order to excuse the defendant's act entirely, on the grounds of self-defense, the defendant must show — again not beyond a reasonable doubt, or not by the

greater weight of the evidence, but simply to your satisfaction — that he acted in self-defense." R. 82-83. The jury found defendant guilty of voluntary manslaughter. At the conclusion of petitioner's trial, he timely filed Notice of Appeal to the North Carolina Court of Appeals. In the record on appeal, petitioner excepted to those portions of the trial Court's instructions placing the burden on petitioner to show that he had acted in self-defense, (Exceptions 57, 58, 60), R. 83, 84 and 89, and to the trial Court's failure to charge that the burden of proof was upon the State to prove every element beyond a reasonable doubt (Exception No. 63). R. 89.

The North Carolina Court of Appeals, relying upon *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975) rejected petitioner's contentions that he had been denied due process by the trial Court's jury instructions which placed the burden of proving self-defense upon him. The Supreme Court of North Carolina had ruled in *Hankerson* that the traditional North Carolina practice of placing the burden on the defendant to prove self-defense is unconstitutional.

> "We hold that by reason by the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense." 288 N.C. at 643.

The Court, however, "declin(ed), without guidance from the (United States) Supreme Court, to give *Mullaney* retroactive effect." 288 N.C. at 652.

Petitioner subsequently sought to appeal to the North Carolina Supreme Court[1] and, alternatively, petitioned that Court for discretionary review.[2] By a Judgment and Order dated

1. See N.C.G.S. §7A-30(1).
2. See N.C.G.S. §7A-31.

March 2, 1976, the North Carolina Supreme Court, without opinion, granted the State's Motion to Dismiss the appeal for want of a substantial constitutional question and denied petitioner's petition for discretionary review. 284 N.C. 453.

ARGUMENT

THE CASE OF *MULLANEY V. WILBUR*, 421 U.S. 684 (1975) SHOULD NOT APPLY TO A CASE TRIED PRIOR TO, BUT PENDING ON DIRECT APPEAL AT THE TIME OF, DECISION; THAT IS, *MULLANEY* SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

The defendant cites the case of *Ivan v. City of New York*, 407 U.S. 203, which gave retroactive effect to *In re Winship*, 397 U.S. 358, a case on which this Court relied heavily in reaching its decision in *Mullaney*. Defendant contends that the *Ivan* ruling calls for this Honorable Court to hold applicable the new rules set forth in *Mullaney*. In *Winship*, the Court held that proof beyond a reasonable doubt is essential to due process at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult.

The Court held the precedent retroactive in *Ivan* on the grounds that the reasonable doubt standard was indispensable in the entire criminal fact-finding process as it related to a juvenile. The State contends that this Court should properly hold, however, that the truth-finding process as it related to the defense of self-defense before the *Mullaney* decision was not so substantially impaired as to justify complete retroactive effect of the new rule as set forth in that case. A criterion which this Court has considered significant in determining the retroactivity of a new rule is the effect which retroactive application of the new rule would have upon the administration of justice. Thus, it has been recognized that if retroactive application of the new rule would impose a substantial burden upon the administration of justice, this is a factor in favor of denying the rule retroactive effect.

For example, in *Johnson v. New Jersey*, 384 U.S. 719 (1966), this Court denied retroactive effect to new rules concerning custodial interrogation. The Court stated that retroactive application of the new rule would seriously disrupt the administration of criminal law; that it would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards; and that prior to the announcement of the new rules, few states were under an enforced compulsion on account of local law to grant requests for the assistance of counsel or to advise accused persons of their privilege against self-incrimination during custodial interrogation, as required by the new rules.

Holding that new rules pertaining to identification at police lineups were not retroactively applicable, this Court, in *Stovall v. Denno*, 388 U.S. 293 (1967), stated that retroactive application of such new rules would seriously disrupt the administration of criminal law. It was noted that at the very least the processing of current criminal calendars would be disrupted while hearings were conducted to determine taint, if any, in police lineup identification evidence, and whether, in any event, the admission of the evidence was harmless error, and that inquiry would be handicapped by the unavailability of witnesses and dim memories. The State would submit that to give retroactive effect to the *Mullaney* case would likewise seriously impose a substantial burden upon the administration of justice in the State.

Furthermore, it is respectfully submitted that the cases previously decided by this Honorable Court indicate so strongly that *Mullaney* should not be given retroactive effect that this Court need not examine the issue separately and need not grant the Petition for Writ of Certiorari.

In refusing to attach retroactive effect to *Mullaney* the Supreme Court of North Carolina, *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), ably stated its reasons as follows:

"While *Mullaney* relied heavily on *Winship* and *Winship* was held to be retroactive in *Ivan v. City of New York*, 407 U.S. 203 (1972), it does not necessarily follow that *Mullaney* will be given retroactive effect.

"In determining whether a new rule of constitutional proportions is given retroactive effect the Supreme Court seems to have considered three factors. The most important factor seems to have been the purpose to be served by the new rule. If the rule is designed to protect the reliability of the fact finding process and 'the constitutional error presents a serious risk that the issue of guilt or innocense may not have been reliably determined' then it has been said that the decision will on this basis alone be given full retroactive effect. *Ivan v. City of New York*, supra (holding *In re Winship*, supra, retroactive); *Roberts v. Russell*, 392 U.S. 293 (1968) (holding *Bruton v. United States*, 391 U.S. 123 (1968) retroactive).

"If the first factor is not determinative then the Supreme Court has considered two other factors: the extent of reliance on previous decisions, *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966), even though the new rule may have been 'foreshadowed' by intervening cases, *Desist v. United States*, *supra* at 248, and the effect on the administration of justice of retroactive application, *Id.* at 251, not only in the nation as a whole but within the particular jurisdictions affected. *Tehan v. United States ex rel. Shott*, *supra* at 418-419.

"Although the first factor listed is clearly the most important, how that factor is approached by the Supreme Court seems sometimes to depend on analysis of the other two factors. *Compare Tehan v. United States ex rel. Shott*, *supra* (holding *Griffin v. California*, 380 U.S. 609 (1965) not retroactive), *with Stovall v. Denno*, 388 U.S. 293 (1967) (holding *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) not retroactive). In holding *Griffin*, which declared unconstitutional the California practice of comment-

ing on a defendant's failure to take the stand, not to be retroactive the Supreme Court in *Tehan* recognized that, although only six states would be affected by *Griffin*, almost every trial in those six states going back many years might have to be upset if *Griffin* were made retroactive. Noting such a devastating impact on the administration of justice, the Supreme Court said:

> 'Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin*. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available.' *Tehan v. United States ex rel. Shott, supra* at 418-419.

"*Mullaney* and *Winship* are poles apart in terms of extent of reliance on previous rules and the effect on the administration of justice of retroactive application. It seems clear that the Supreme Court saw no reliance by New York on previous rules in *Winship*. It traced almost 100 years of cases in which it had 'assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.' *In re Winship, supra* at 362. It considered *In re Gault*, 387 U.S. 1 (1967) as an express rejection of the notion that the Due Process Clause was inapplicable to juvenile proceedings. *In re Winship, supra* at 365. *Winship*, furthermore, involved a juvenile proceeding. Its impact, consequently, on the administration of justice in New York would obviously be less than a rule which applies to all homicide cases.

"The jury instructions here under attack are based upon rules which have been firmly with us for over one hundred years. Retroactive application of *Mullaney* in this State would, furthermore, have the same sort of affect, recognized in *Tehan*, as *Griffin* retroactivity would have had in California and other jurisdictions. As of June 30, 1975, there were 269 inmates in prison in this State who had been convicted of first degree mur-

der serving sentences of life imprisonment or awaiting execution, and 728 inmates in prison having been convicted of second degree murder serving sentences ranging from two years to life. State Correctional Statistical Abstract for the Second Quarter, 1975. If *Mullaney* is to be applied retroactively new trials might have to be awarded in many cases decades old.

"A number of other jurisdictions would, we believe, be similarly affected. In the following seven jurisdictions the defendant has (or had) the burden to prove by a preponderance of the evidence heat of passion on sudden provocation (or 'extreme emotional distress') to reduce murder to manslaughter: *Delaware, Fuentes v. State*, 18 Crim. Law Rptr. 2153 (Del. Oct. 14, 1975); *Hawaii*, (*Mullaney* would probably affect cases in which the appeal was finally determined prior to August 27, 1971. *Compare State v. Santiago*, 53 Haw. 254, 492 P. 2d 657 (1971) *with State v. Cuevas*, 53 Haw. 110, 488 P. 2d 322 (1971)); *Maine, Mullaney v. Wilbur, supra; Maryland, Wilson v. State*, 261 Md. 551, 276 A. 2d 214 (1971); *Wilson v. State*, 28 Md. App. 168, 343 A. 2d 537 (1975); *Burko v. State*, 19 Md. App. 645, 313 A. 2d 864 (1974) vacated 422 U.S. 1003, 95 S.Ct. 2624 (1975); *Massachusetts, Comm. v. Johnson*, ___ Mass. App. ___, 326 N.E. 2d 355 (1975) restating the rule of *Comm. v. York*, 50 Mass. (9 Met.) 93 (1845); *Cf. Comm. v. Gagne*, ___ Mass. ___, 326 N.E. 2d 907, 910 (1975); *New York, People v. Balogun*, 372 N.Y.S. 2d 384 (N. Y. Supreme Ct. Kings County 1975); *Tennessee, Hawkins v. State*, 527 S.W. 2d 157 (Tenn. App. 1975). If, as we believe, *Mullaney* prohibits requiring the defendant to prove that he acted in self-defense by a preponderance of the evidence when that issue is properly presented the following seven jurisdictions would be adversely affected: *Georgia, Chandle v. State*, 230 Ga. 574, 198 S.E. 2d 289 (1973); *See also Henderson v. State*, ___ Ga. ___, 218 S.E. 2d 612 (1975) (citing *Mullaney*); *Ohio, State v. Poole*, 33 Ohio St. 2d 18, 294 N.E. 2d 888 (1973) (for cases prior to January 1, 1974, the effective date of Ohio Rev. Code Ann. § 2901.05 (Page 1975) which probably corrects Ohio law);

Pennsylvania, Comm. v. Cropper, ... Pa. ...., 345 A. 2d 645 (1975) (intimating that *Mullaney* may affect Pennsylvania); *Comm. v. Carbonetto,* 455 Pa. 93, 314 A. 2d 304 (1974); *Comm. v. Winebrenner,* 439 Pa. 73, 265 A. 2d 108 (1970); *Rhode Island, State v. Mellow,* 107 A. 871 (1919); *South Carolina, State v. Judge,* 208 S.C. 497, 38 S.E. 2d 715 (1946); *Texas, Parkman v. State,* 149 Tex. Cr. 101, 191 S.W. 2d 743 (1945) (at least in cases tried before January 1, 1974, the effective date of the new Texas Penal Code §§ 2.03, 9.02, 9.31 (Vernon 1974), which probably corrects Texas law in this respect); *West Virginia, State v. Collins,* 154 W. Va. 771, 180 S.E. 2d 54 (1971).

"Retroactive application of *Mullaney* requiring retrials in homicide cases years old in at least fifteen jurisdictions would, we believe, have on the administration of justice in this country a devastating impact.

"We concede that the purpose of the *Mullaney* rule, to insure a reliable determination of the question of guilt, or the degree of guilt, weighs in favor of retroactivity. Yet the Supreme Court has recognized that 'the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities.' *Williams v. United States,* 401 U.S. 646, n. 7 (1971); *Stovall v. Denno, supra.* While in *Winship* there could be no question that the standard of proof employed was determinative on the issue of guilt, *In re Winship, supra,* n. 2, whether the jury instructions condemned in *Mullaney* and even more clearly those under attack here would in the final analysis be so determinative to a jury so instructed is a matter of pure speculation.

"We note that both cases from other jurisdictions which have so far considered the question, have determined that *Mullaney* should not be given retroactive effect. *Fuentes v. State, supra* (Delaware); *People v. Balogun, supra* (New York)."

CONCLUSION

For the above stated reasons, this Honorable Court should

deny Petitioner's Writ of Certiorari to the North Carolina Court of Appeals.

Respectfully submitted,

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